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Death of Hardiman Owens. Letter from the Secretary of War transmitting the information required by a resolution of the House of Representatives of the 18th ultimo, in relation to the death of Hardiman Owens.

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DEATH OF HARDIMAN OWENS.

LETTER

FROM

THE SECRETARY OF WAR,

TRANSMITTING

The information required by a resolution of the House of Representatives of the 18th ultimo, in relation to the death of Hardiman Owens.

MARCH 4, 1834.

Read, and laid upon the table.

WAR DEPARTMENT, March 3, 1834.

SIR: I have the honor to transmit, in conformity with a resolution of the House of Representatives of the 18th ultimo, the accompanying documents, which contain, it is believed, all the correspondence and information on the files of this department relating to the objects stated in the said resolution.

Very respectfully, your most obedient servant,

LEW. CASS.

HON. A. STEVENSON,
Speaker of the Ho. of Reps.

HEAD QUARTERS OF THE ARMY,

Washington, April 5, 1832.

SIR: Instructions have been given by the Government to the United States marshal of the southern district of Alabama to remove the intruders on the Indian lands, in conformity with the provisions of the act of Congress of March 3, 1807.

Should the marshal find it necessary to be aided by the military force of the United States, he is authorized to call upon you; you will, therefore, afford him such aid in the execution of his duty as he may require.

I have the honor to be, sir,

Your obedient servant,

ALEX. MACOMB,
Maj. Gen. com'g the Army.

Major P. WAGER,
Or officer com'g Fort Mitchell, Ala.

ADJUTANT GENERAL'S OFFICE,

Washington, February 22, 1834.

SIR: In compliance with your instructions, I respectfully enclose, herewith, copies of all the communications on file in the Adjutant General's office in relation to the death of *Hardiman Owens*.

No. 1. Brevet Major McIntosh's letter, dated August 12, 1833, enclosing the official report of Lieutenant D. Manning.

No. 2. Lieutenant D. Manning's official report.

No. 3. Major McIntosh's letter, dated October 21, 1833, reporting the proceedings of the civil authorities of Alabama touching the death of Owens.

No. 4. Is a copy of my communication of the 26th of August, 1833, containing instructions to Major McIntosh, by direction of the Secretary of War.

These documents furnish all the information, it is believed, which the records of this office afford in relation to the subject embraced in the resolution of the House of Representatives of the 18th instant.

I am, sir, very respectfully,

Your obedient servant,

ROGER JONES, *Adj. Gen.*

To Maj. Gen. A. MACOMB,
Com'g the Army, Washington.

No. 1.

DETACHMENT, HEAD QUARTERS,

Fort Mitchell, Ala., August 12, 1833.

SIR: On the 29th of the last month I detached Lieutenant Manning and thirty men with the deputy marshal of Alabama, (Mr. Austill,) for the purpose of removing white intruders from the lands occupied by the Creek Indians. During the absence of the command I received the enclosed communication, herewith forwarded for the information of the commander in chief.

Very respectfully, I am, sir,

Your obedient servant,

J. S. McINTOSH,
Major bt. 4th Inf. com'g.

Colonel R. JONES,
Adj. Gen. U. S. A. Washington.

True copy from the original, on file in the Adjutant General's office.

R. JONES, *Adj. Gen.*

No. 2.

CREEK NATION, (at Mr. Spain's,) July 31, 1833.

SIR: I have been detained here since yesterday evening, by meeting with some trouble in effecting the orders of the marshal with regard to

Hardiman Owens, an intruder. We proceeded to Owens's house this morning, for the purpose of removing him beyond the limits of the nation. He did not seem to expect us so soon, and on this account we had no difficulty in making him a prisoner. But the marshal, willing to be lenient with him, released him on his promising faithfully to leave the nation peaceably in six or eight days, or by the time we returned. Thinking we should have no more difficulty with him, I ordered the command to move on, but our backs were scarcely turned before he came to Spain's, and made violent threats against the chiefs, saying "that he would send his family away, but he would have revenge before he left." As soon as the marshal heard this, he directed me to push after the command, and returned himself to Spain's, to await me there; the men had marched so briskly that they had got over five miles before I overtook them. The orderly sergeant and ten men only were detached; the remainder being somewhat fatigued, I ordered to proceed no further than Cook's, (about three miles ahead,) and there await our return. When I got back to Spain's I heard that Owens had removed his family. We found him seated in the front of the passage leading through the house. The marshal was in the act of alighting, *at Owens's invitation*, to go in, when some person from the rear hailed him, and told him that a keg of powder had been placed in the house to blow us up. The soldiers at this instant came up, and Owens, seeing that he could not get the marshal in his trap, and conceiving that the detachment was near enough to be liable to some injury, ran out behind the house, and fired the train. Luckily for us, his arrangement must have been bad, for the explosion did little other damage than blowing off the roof. The detachment immediately scattered in pursuit, and chased him to Scroggins', where he had sent his family, and from thence about three-quarters of a mile farther, but owing to his better knowledge of the ravines and swamps, he managed to escape. At Scroggins', concealed among some stables, he snapped a rifle, it is supposed, at the marshal, but he was so closely pursued that he had no time to renew the attempt. By the orders of the marshal, the corn corp was destroyed, and we again returned to Mr. Spain's. We had not been there ten minutes before an Indian came with a *message from Owens*, informing the marshal that he had returned, and was waiting for him. Riding constantly all day had by this time so irritated two large boils on my leg, that it was with the greatest pain I could walk or ride. I sent for the orderly sergeant, and gave the necessary orders, with the marshal's, to "take him, dead or alive." They surrounded the house before they were discovered, and the sergeant summoned him to surrender. The party with the sergeant being too strong for him, he broke through the house, telling the sergeant to come on, and ran through the field. He was *here* met again, and again summoned to surrender, but he answered only by presenting a pistol, and the detachment in self-defence, and in obedience to the orders received, was compelled to fire. His death was instantaneous, the ball passing through his head.

From information obtained from a man named Bard, who was found about the premises and brought in a prisoner, it was ascertained that Owens had employed him to carry his family to Columbus, saying "it was his intention to remain awhile, for he was determined to lose his life or take the marshal's; that he would make an attempt that night; he would pursue him to Mobile, if necessary, to kill him." He also said, that "as we came up to the house, (a short time before he blew it up,) the marshal

and I had a narrow escape, as nothing but a citizen who was between him and us prevented him from firing at us, alternately, with a double barrelled gun." These circumstances I mention at the marshal's request, to show the aggravated nature of the case, and that the man's own obstinacy has brought his death on him.

Very respectfully,

D. A. MANNING,

2d Lieutenant, commanding Detachment.

Sergeant Underwood has charge of the remainder of the detachment. I shall join him by breakfast to-morrow.

To Major J. S. McINTOSH,

Commanding at Fort Mitchell, Alabama.

True copy from the original on file in the Adjutant General's office.

R. JONES, *Adjutant General.*

No. 3.

DETACHMENT, HEAD QUARTERS,

Fort Mitchell, Ala., October 21, 1833.

GENERAL : I think proper to advise you of the very great excitement prevailing in this State in consequence of the death of Hardiman Owens, and the intended removal of the intruders from the Indian lands, and particularly of the course that has been, and is intended to be, pursued by the civil authorities in relation to these matters. The superior court, which has just adjourned its session, in this county, has, through the Solicitor, demanded of me the detachment of soldiers that was present at the killing of Owens, and, on my refusal to comply with that mandate, the court then issued a writ, commanding the sheriff to take me before it for contempt; and, on my refusal to attend the court, the sheriff was put on oath to declare whether or no he thought there was sufficient force in the county to take me; and, on his replying that if I chose to resist, he did not believe there was, a despatch was sent express to the Governor of the State, demanding or requesting that he would order out a sufficient military force to arrest me.

It is scarcely necessary for me to say that I ever would regard the *proper legal mandates of my country*. I have refused to comply with the warrants of *this court*, not only because I conceive their proceedings in this matter illegal, but I could not surrender the detachment of troops required, (to be tried for murder,) who had unquestionably only been engaged in the legal, constitutional performance of their duty, and execute the orders from the War Department to the United States marshal for this district, and those from yourself to me in relation to the removal of intruders. I believe this is only the commencement of a determined opposition of the authorities of this State, to prevent the execution of these instructions.

I am informed, though not officially, but from respectable sources, that it is the intention of the Executive of this State, on my movement with the marshal to eject the intruders, to meet me with a civil process to stay

our proceedings, and, if I refuse to obey that mandate, then to enforce the civil [authority] with the military of the State.

In anticipation of these events, I wish to be distinctly informed of the course I am to pursue. No discretionary powers have been left me ; my instructions are to aid the marshal, with the entire force under my command, in the removal of intruders, leaving a sufficient guard at this post for the protection of the public property. Under these instructions, onward I must and will go ; but if any credit is to be given to the reports in circulation, it will take a much larger command to execute your orders than the present garrison.

I have the honor to be,

Very respectfully,

Your obedient servant.

J. S. McINTOSH,

Major bt. 4th Inf. com'g.

To Major General ALEX. MACOMB,

Commanding U. S. Army, Washington City, D. C.

True copy from the original on file in the Adjutant General's office.

R. JONES, Adjutant General.

No. 4.

ADJUTANT GENERAL'S OFFICE,

Washington, August 26, 1833.

SIR: The Secretary of War directs that you will, with the entire force under your command, afford all necessary aid to the marshal of Alabama, in the discharge of his duties, relating to the removal of intruders from the Indian lands located within his district. You will, therefore, on the requisition of the marshal, promptly repair with your command to such points as he may designate, in order to best effect the object in view.

You will leave a sufficient guard at Fort Mitchell to take charge of the post, and the public property which may remain.

One company of artillery has been ordered from Charleston harbor to Fort Mitchell, with orders to report to you. It is believed, that, with this augmentation of your force, you will be able to carry into full effect the requirements of the Government ; and, it is not doubted, in the most satisfactory manner.

I am, sir, very respectfully,

Your obedient servant,

R. JONES, Adjutant General.

Brevet Major J. S. McIntosh,

4th Infantry, Fort Mitchell, Alabama.

True copy.

R. JONES, Adjutant General.

Correspondence and documents in relation to the death of H. Owens, the conduct of the officers and soldiers indicted, and the removal of the prosecutions to the United States court.

DEPARTMENT OF WAR,

Office Indian Affairs, February 22, 1834.

SIR: I have the honor to lay before you copies of documents, on file and on record in this office, having relation to the death of Hardiman Owens, the conduct of the officers and soldiers against whom process issued from the State court of Alabama, and the removal of those prosecutions to the court of the United States; prepared in compliance with the resolution of the House of Representatives of the 18th instant.

I am, sir, very respectfully, your obedient servant,

ELBERT HERRING.

Hon. LEWIS CASS,

Secretary of War.

DEPARTMENT OF WAR,

April 5, 1832.

SIR: You will receive herewith a copy of the treaty recently concluded with the Creek tribe of Indians.

By the 5th section, you will perceive the circumstances under which intruders are to be removed from the ceded land.

It is the President's desire that this article be faithfully executed, but that it be executed with as much regard to the feelings and situation of the persons whose cases are embraced by it as possible.

I am directed by the President to instruct you to repair to the district ceded by this treaty, and give notice to all persons, except those allowed by the treaty to remain till their crops are gathered, to remove within as short a period as practicable, having due regard to their local position and other circumstances. This period you will fix and publicly make known, explaining fully to all persons interested the obligations of the Government, and the earnest hope of the President that a just regard to these will induce every citizen to remove within the time prescribed.

And I will not permit myself to doubt but that the valuable cession made by the Indians, and the public faith which has been plighted to them, will furnish motives sufficiently powerful to produce this desirable result.

Should it, however, be otherwise, you are requested to remove all these persons, under the provisions of the act of Congress of March 3, 1807. And to enable you so to do, orders have been given to the commanding officer at Fort Mitchell, to aid you with the military force under his command.

You will call upon him for such assistance as you may find necessary, and the same will be furnished and applied agreeably to your directions.

In the execution of this delicate trust, I recommend to you to be as conciliatory as may be compatible with the object to be attained.

Apply force only when absolutely necessary, and then after having fully explained to the parties their own duties, the rights of the Indians, the

obligations of the Government, and the instructions you have received. When a person is removed beyond the boundary line, he will be left entirely free.

As all persons upon the lands are liable under the law to be removed, and as the exception in the treaty merely operates to allow the Government to permit them to remain, the evidence in each case will be furnished by those who claim the benefit of this exemption, and must be such as will be satisfactory to you.

You will keep this department advised of your proceedings in this business.

Very respectfully, &c.

LEW. CASS.

TO ROBERT L. CRAWFORD, Esq.

Marshal for the southern district of Alabama, Tuscaloosa.

DEPARTMENT OF WAR,

May 9, 1832.

SIR: I have just received your letter of the 27th ultimo. The publication of the notice was proper, and if the circulation of the papers which contain it is not sufficiently extensive in the ceded country for the purposes of general information, you will give such further publicity to it as you may think necessary.

The President still trusts that all those persons, whose cases are not embraced in the treaty, will peaceably and freely remove; but should it be otherwise, it will only remain for you to execute the laws and your instructions, with as little injury to the parties as possible.

The Government have contracted solemn obligations with the Creeks, and have received a valuable consideration, and every principle of justice and good faith requires that our part of the compact should be executed.

I am anxious you should commence your measures in season, to prevent the Creeks from being disturbed in raising their crops.

Your reasonable charges will be paid by the department.

Duplicates of this letter are sent, one to Montgomery, and the other to Mobile.

Very respectfully,

Your obedient servant,

LEW. CASS.

TO ROBERT L. CRAWFORD, Esq.

Marshal, southern district of Alabama.

DEPARTMENT OF WAR,

October 26, 1832.

SIR: The frequent complaints which have recently been made to the department of intrusions upon the Creek lands by the white people, in contravention of law and treaty stipulations, render it necessary again to

call your attention to this subject. It is a matter in which the good faith and character of the Government are involved, and it is expected that its officers will exert the utmost vigilance to prevent all just complaints.

In renewing my former instructions to you, I have to inform you that orders have again been given to the commanding officer at Fort Mitchell, to afford the necessary military aid to carry into effect your instructions; and to the District Attorney to prosecute all persons who may return to the Indian country after their removal. You will, therefore, call upon the commanding officer for such force as may be requisite for the speedy removal of all intruders; and upon the District Attorney, to carry into effect the instructions which you have received in regard to the prosecution of those who may return. It is the wish of the Government that the most energetic measures be taken immediately for the accomplishment of these ends.

Very respectfully, &c.

LEW. CASS.

ROBERT L. CRAWFORD, Esq.

Marshal, southern district of Alabama.

DEPARTMENT OF WAR,
Office Indian Affairs, March 14, 1833.

SIR: Fresh complaints having been made to the department of intrusion of the lately ceded Creek country, the commanding officer at Fort Mitchell will be ordered to station troops at whatever places you may direct, and to assist you in expelling intruders, and preventing their return. He will act under your instructions, and your special attention will be directed to this object. It is obligatory on the Government to protect the Creek Indians in the enjoyment of their land, until their removal; and your best exertions are particularly required to put an end to this lawless and disgraceful practice of intrusion. The necessary military aid will therefore, on your requisition, be furnished for this purpose; and you will, moreover, cause the District Attorney to prosecute all those who shall have the temerity to return after their expulsion.

The faith of the Government requires that this business should be followed up with vigilance and energy. The Indians must be protected, and the white trespassers must be driven off, and, if possible, punished, in order to prevent a repetition of such illegal and reproachful conduct.

The Secretary of War, solicitous to preserve the reputation of the Government, and to maintain the rights and promote the welfare of the Indians, commits the subject, with these remarks, to your discretion, well knowing that your feelings will prompt you to aid the oppressed, and your judgment will direct the adoption of measures most likely to effect the object in view.

With high respect, &c.

ELBERT HERRING.

TO ROBERT L. CRAWFORD, Esq.

Marshal, southern district, Tuscaloosa, Alabama.

DEPARTMENT OF WAR,

May 10, 1833.

SIR: I have just received your letter of the 25th ultimo, and regret exceedingly that any delay should have occurred in the execution of the provisions of the last Creek treaty, respecting intruders upon their lands. Why the commanding officer at Fort Mitchell has not received the orders, I cannot conjecture. The mistake, however, has been rectified, and positive orders have been issued to him to carry into effect your requisitions on the subject of these intruders. I trust the stipulations of the treaty will now be faithfully executed either by the voluntary withdrawal of the intruders, or by their forcible removal, should they refuse to withdraw.

Very respectfully, &c.

LEW. CASS.

ROBERT L. CRAWFORD, Esq.

Marshal, southern district of Alabama.

DEPARTMENT OF WAR, June 3, 1833.

SIR: Information has reached the department that persons are establishing themselves upon the Creek lands in Alabama, in violation of the stipulations of the treaty concluded with the Creeks on the 24th of March, 1832. If such is the case, you will warn such persons to remove, and if they do not depart, without delay, you will instruct the military force placed at your disposal to remove them. It is the direction of the President that the instructions heretofore given to you on this subject be punctually carried into effect.

Very respectfully, &c.

LEW. CASS.

TO ROBERT L. CRAWFORD, Esq.

Marshal of Alabama.

CREEK NATION, July 31, 1833.

DEAR SIR: I have to report one of the most unpleasant cases that has occurred. A number of the chiefs complained of Hardiman Owens, who lives twenty miles from Fort Mitchell, and he says has recently been appointed postmaster. I came to his house two days since, and informed him that there were many charges against him; that of taking their fields from them, and killing their hogs, horses, and beating the Indians in a most cruel manner, all of which were proven by the Indians and several white persons.

I then ordered him to leave the nation; he replied he would die before he left. I left, however, to visit the Tucabatchee town, and move him on my return. Soon after leaving, the chiefs came after me, and begged me not to leave them; that he had drawn his knife on them, and swore he would kill some of them. I returned with a command, and arrested him; he then begged, and promised to leave in peace. I let him go, and proceed

ed on about fifteen miles, and was again overtaken by the Indians, stating that he had followed them, and threatened he would burn their houses and kill all those who dared to come upon the fields taken by him. I then returned, and met him on the road, and he ordered me to keep off from his place; I replied that the troops were returning, and he had better leave before they arrived. He went back home, and sent his family off, and set a mine in his house, and when we reached there, he very politely asked us to walk in. I was in advance about fifty paces of the command; and when in the act of riding up to the gate, an Indian called, and stated that there was powder in the house. I turned my horse to leave, and Owens ran out in the rear; I called to the men to come up and arrest him if possible, but not to enter the house; and in a few seconds it blew up, but fortunately no one was injured; we gave chase, but he escaped: in the pursuit, he snapped a gun at me.

We had not left the place one mile before he returned, swearing he would kill me on sight, and some half dozen Indians.

I therefore directed the Indians to take him if possible, and, if he returned among them, to shoot him down. I have sent another detachment after him, who are now absent. He also stated that but for several persons behind me, he would have shot me before he sprung the mine. He is the most daring man I have ever met with, and one of the most dangerous. The Indians are in great alarm, and beg of me not to leave them unless he is taken. In all other cases I have had no difficulty in compelling such as are peaceable to pay rents and damages for their intrusion upon the Indian fields; and a few who have been troublesome, and for stealing and killing stock, have been removed.

I have the honor to be,

Sir, your obedient servant,

JEREMIAH AUSTILL,

Deputy Marshal, southern district of Alabama.

LEWIS CASS, Esq.

N. B. The detachment has returned, and informed me that he was surrounded by them, but drew his arms, and when in the act of firing upon the sergeant, one of the men shot him.

DEPARTMENT OF WAR, August 10, 1833.

SIR: I have received your letter of the 31st ult., communicating the intelligence that a person had been killed while resisting the execution of the instructions for the removal of intruders from the land ceded by the Creek Indians to the United States. So far as the facts are reported by you, unfortunate as the result is, the department has no ground to censure your proceedings. Instructions have been given to the military commanding officer, to facilitate, by all the means in his power, any investigation which the civil authority may consider it necessary to make into the transaction. I have to request that, in the further execution of your duty, you will keep strictly in view the law, your instructions, and the plighted faith of the Government, and that you will act with as much caution and forbearance as the circumstances will justify.

Very respectfully, &c.

LEW. CASS.

JEREMIAH AUSTILL, Esq., *Deputy Marshal, &c.*

EXECUTIVE DEPARTMENT,

Tuscaloosa, 20th August, 1833.

SIR: An attempt by the deputy marshal of the southern district of Alabama to remove an individual by the name of Owens, from premises alleged to belong to an Indian, has resulted in the death of the supposed trespasser. A detachment of United States soldiers, on the requisition of the deputy marshal, was placed under his direction, and the deceased was shot by one of these soldiers. The frequent incursions of this officer with an armed force, among our inhabitants residing in the country acquired from the Creek Indians, with the purpose of settling disputes between them and the Indians, have produced very general dissatisfaction, which, since the killing of Owens, has risen to an excitement that, if not quieted, will lead to excesses, equally unpleasant to the General Government, and to the authorities of this State.

It is not my purpose to show that the conduct of the marshal was improper, or that an offence has been committed against our laws, but to request that the Government would refer the complaints of the Indians to a tribunal less exceptionable than that of the marshal with an armed soldiery.

JOHN GAYLE.

Hon. LEWIS CASS,
Secretary of War.

LEXINGTON, *September 5, 1833.*

SIR: I enclose to you, for the information of the President, a letter just received from the widow of the man who was killed by the regular troops in their attempt to remove him from the lands possessed by the Creek Indians in the State of Alabama. Owens was a native of Georgia, and of the county in which I reside. His friends are numerous and very respectable. His father died in the service of the country, and was considered a highly valuable officer in the army commanded by General Floyd, in the expedition against the Creek Indians.

I passed the place of Owens's residence in the month of June last, and understood that he had a very fine crop growing. I suppose that the object of Mrs. Owens' application to the President is to have some compensation made her by the Creek Indians for the loss of that crop.

Mrs. Owens is left without property, with a family of children whom she is unable to provide for, from a chronic disease of the most unfortunate kind.

Permit me to request your attention to her case, and if she is entitled to any redress for the injury she has sustained, that it be offered her through your interference.

Very respectfully, yours, &c.

GEORGE R. GILMER.

Hon. LEWIS CASS.

DEPARTMENT OF WAR,

September 5, 1834.

SIR: I have had the honor to receive and to lay before the President yours of the 20th ult., and I have it in charge to communicate his

views upon the subject of the intruders upon the Creek lands, to which you refer.

The occurrence, which has resulted in the death of an individual, is much to be deplored. Whether the circumstances were such as to justify the act, is not for me to judge. It is the earnest wish of the department that the force employed in this unpleasant duty shall be applied so as to produce the desired results, with the least possible injury to individuals, and with the greatest forbearance; and such will be found to be the spirit of all the instructions which have been issued.

LEW. CASS.

To His Excellency JOHN GAYLE, Tuscaloosa, Ala.

DEPARTMENT OF WAR,

September 16, 1833.

SIR: I have had the honor to receive your letter of the 5th instant, but the letter of Mrs. Owens, to which you refer, was not enclosed. Had it been, I should certainly have presented it to the President, though it is difficult to see what action could have taken place upon it. The death of Mr. Owens is much to be deplored, and it was with much regret that the President found such a state of things to exist in the country ceded by the Creek Indians in Alabama, as to render it necessary to remove the intruders, agreeably to the provisions of the treaty, and under the act of Congress of March 3, 1807. But no other alternative presented itself, consistently with the obligations of the Government and the rights of the Indians.

I am not aware of any measure which the President can adopt for the relief of Mrs. Owens. Her application for assistance can only be heard and determined by Congress. As her case does not come within the intercourse act of 1802, no direction can be given for the payment of her claim from the Creek annuity.

Very respectfully, &c.

LEW. CASS

To the Hon. GEORGE R. GILMER, Lexington, Georgia.

DEPARTMENT OF WAR,

October 19, 1833.

SIR: I have received your letter of the 3d instant, and, in answer, have to inform you that you will submit to any legal process which may be served upon you. Your duty consists in removing from the ceded territory the intruders who have taken possession of it in violation of the law and the stipulations of the Creek treaty of 1832. In executing this duty, you will employ all the necessary means placed at your disposal by the particular instructions of the Government, or by the general provisions of the acts of Congress; though the President cannot but hope that, on a full view of the obligations of the United States, and the entire want of title on the part of the persons living in this district of country, they will peaceably remove within the period limited by you. If suits

are instituted against you, in any of the State courts, for your proceedings in this matter, submit to the process without hesitation. Interpose not the slightest obstacle to its service. The United States claim no particular jurisdiction over the inhabitants of the ceded country. They only claim the right to remove them from the public land they occupy. The District Attorney will be instructed to remove to the courts of the United States, wherever it can be legally done, all suits instituted against you on this account, and there to conduct your defence; or, if necessary, you will remove them yourself. He will be likewise instructed to defend you in the State courts, in those suits, if any there be, which cannot be removed into the courts of the United States.

LEW. CASS.

To ROBERT L. CRAWFORD, Esq.

U. S. Marshal, southern district of Alabama, Mobile.

EXECUTIVE DEPARTMENT,

Tuscaloosa, October 23, 1833.

SIR: I have received to-day, by express, from the Hon. P. T. Harris, one of the circuit judges of this State, sundry documents, establishing the fact that all attempts by the civil officers to investigate the circumstances in relation to the killing of Owens have proved unavailing, and that the process of the court has been set at defiance by the commanding officer at Fort Mitchell. I transmit copies of the whole of these despatches for the consideration of the President, and respectfully request that you will advise me of his determination on the subject at an early period.

I have the honor, &c.

JOHN GAYLE.

Hon. LEWIS CASS, *Secretary of War.*

THE STATE OF ALABAMA, }
Russel County. } *Circuit Court, October Term, 1833.*

The grand jurors for the county of Russel, and State aforesaid, on their oath, present, that James Emmerson, late of the county aforesaid, known as a soldier in the United States army, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and thirty-three, with force and arms, in the county aforesaid, in and upon one Hardiman Owens, in the peace of God, and of the State of Alabama, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said James Emmerson, with a certain gun called a musket, of the value of ten dollars, then and there being, charged with gunpowder and a leaden bullet, which gun he, the said James Emmerson, in both his hands then and there had and held, at, against, and upon him, the said Hardiman Owens, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off; and that the said James Emmerson, with the leaden bullet aforesaid, by force of the gunpowder aforesaid, out of

the gun aforesaid, by him, the said James Emmerson, so as aforesaid discharged and shot off him, the said Hardiman Owens, in and upon the right side of the head of him, the said Hardiman Owens, then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, the said bullet, so discharged and sent forth as aforesaid, passing through the head of him, the said Hardiman Owens, giving to the said Hardiman Owens, then and there, with the leaden bullet aforesaid, out of the gun so as aforesaid discharged and shot off, in and through the head of him, the said Hardiman Owens, one mortal wound, of the breadth of one inch, and of the length of six inches ; of which said mortal wound the said Hardiman Owens then and there instantly died ; and that James King and Frank Borger, both soldiers of the United States army, and five others, to the jurors unknown, all late of said county, feloniously, wilfully, and of their malice aforethought, then and there were present, aiding, abetting, assisting, comforting, and maintaining the aforesaid James Emmerson, to do and commit the felony and murder aforesaid, in manner aforesaid, and in form aforesaid ; and so the jurors aforesaid, upon this their oath aforesaid, do say, that the said James Emmerson, Frank Borger, and James King, and the five others to the jurors unknown, then and there, feloniously, wilfully, and of their malice aforethought, in manner and form aforesaid, did kill and murder the said Hardiman Owens, against the peace and dignity of the State of Alabama.

And that one David Manning, a lieutenant in the United States army, late of said county, and one Jeremiah Austill, late of said county, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, in the county aforesaid, before the said murder was committed, in form aforesaid, to wit, on the thirteenth day of October, in the year aforesaid, in the county aforesaid, did, feloniously, wilfully, and maliciously, incite, move, procure, aid, counsel, hire, and command, the said James Emmerson, James King, and Frank Borger, and the five others to the jurors unknown, the said murder in manner and form aforesaid to do and commit, against the peace and dignity of the State of Alabama.

WM. D. PICKETT,
Solicitor Eighth Circuit.

THE STATE OF ALABAMA, } *Circuit Court, October Term, 1833.*
Russel County.

I do hereby certify the within indictment, together with the endorsement, to be a true copy from the original bill on file in my office.

B. G. G. A. LUCAS, *Clerk.*

THE STATE OF ALABAMA, } *Circuit Court, October Term, 1833.*
Russel County.

To the Sheriff of said county, Greeting :

You are hereby commanded without delay to take the body of Major James McIntosh, if to be found in your county, and bring him forthwith before the honorable the judge of the circuit court for the county

of Russel, now in session, to answer to said court for a contempt of the same. Herein fail not, and have you then and there this writ, with your endorsement thereon.

Bevel Lucas, Clerk of the circuit court for Russel county, this 15th October, 1833.

B. G. G. A. LUCAS, *Clerk.*

Issued 15th October, 1833.

Sheriff's Return.

I went to the fort, and called on defendant. He swore I should not take him. I am satisfied, if I had made the attempt, it would have been at the risk of my life. That defendant was commanding officer at the fort, and had sworn, on yesterday, he would not surrender up any one in the fort.

E. D. CROWELL, *Sheriff R. C.*

October 16, 1833.

RUSSEL COURT-HOUSE, ALABAMA,

October 14, 1833.

SIR: I am advised through the medium of the "Globe" at Washington City, the official paper of the administration, and from other high and respectable sources, that the commanding officer at Fort Mitchell has been instructed to afford to our civil authorities all proper facilities for putting the case of the killing of Hardiman Owens in a train for legal investigation. The circuit court of Alabama for the county of Russel is now in session, and a bill of indictment against the perpetrator or perpetrators of that act will this day be prepared. In pursuance of those instructions, I have thought proper, from a sense of duty, respectfully to ask at your hands the aid required, and to facilitate this object, that the detachment of soldiers who were present at the killing of Owens be delivered over to the sheriff of this county. The reason why this is deemed necessary is owing to the difficulty of ascertaining the name or names of the person who committed the act, as no one was present, it appears, but the file of soldiers; or this may be dispensed with if you will be good enough to furnish the State with the name or names in question, and with the witnesses who will prove the fact.

Respectfully, &c.

WM. D. PICKETT,

Solicitor Eighth Judicial Circuit.

P. S. Accompanied herewith is the "Globe" of the 24th August last, containing the article alluded to. An answer is respectfully requested.

W. D. P.

Major JAMES S. McINTOSH.

FORT MITCHELL, ALABAMA,

October 15, 1833.

SIR: In reply to your communication of yesterday, informing me that you have been advised through the medium of the "Globe" at Washington City, the official paper of the administration, and from other high and respectable sources, that the commanding officer at Fort Mitchell has been instructed to afford to our civil authorities all proper facilities for

putting the case of the killing of Hardiman Owens in a state of legal investigation, I have to inform you that I have received no instructions relative to the case above cited, and I apprehend that I will not, from the simple fact, that the soldier who shot Hardiman Owens was in the lawful execution of his duty. I must therefore decline your invitation to deliver to the sheriff of this county the detachment of soldiers who were present at the time that Owens was killed. Had any officer or soldier of my command unlawfully used violence, or committed any offence against the persons or property of any citizen of the United States, such as is punishable by the known laws of the land, no one would have been more ready or willing, upon legal application, duly made, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate.

I am, sir, very respectfully, &c.

J. S. McINTOSH,

Major bt. 4th Infantry, commanding.

WM. D. PICKETT, Esq.

Solicitor Eighth Judicial Circuit.

THE STATE OF ALABAMA, } *Circuit Court, October Term, 1833.*
Russel County.

This day came Eli Couch in open court, and maketh oath that he resides at Fort Mitchell; that he knows Sergeant Francis Borger, James King, and James Emmerson; that they are soldiers in the fort, and under the command of James McIntosh; that he has seen them in the fort within one or two days past, and almost daily for the last five or six months; that they are generally there on duty; that when he went with the sheriff of Russel county with process against them, they were absent from the said fort, while all the other soldiers, he believes, were present.

Sworn to in open court, the 16th October, 1833.

B. G. G. A. LUCAS, *Clerk.*

THE STATE OF ALABAMA, } *Circuit Court, October Term, 1833.*
Russel County.

This day came Samuel C. Benton in open court, and made oath that he lives at the fort, and knows Frank Borger, James King, and James Emmerson, soldiers of the United States army at said fort, under the command of Major James McIntosh; that he has seen them, or some one or two of them, there as late as the 13th instant; that they are there generally on duty, and have been for some time past.

Sworn to in open court, 16th October, 1833.

B. G. G. A. LUCAS, *Clerk.*

THE STATE OF ALABAMA, } *Circuit Court, October Term, 1833.*
Russel County.

I do certify the foregoing to be true copies of originals now on file in my office.

B. G. G. A. LUCAS, *Clerk.*

October 17, 1833.

RUSSEL COURT-HOUSE,

17th October, 1833.

SIR: To your Excellency as Chief Magistrate of the State of Alabama; I enclose copies of a correspondence between the solicitor general of this circuit and the commanding officer at Fort Mitchell, the affidavit of the sheriff of this county, the affidavits of two gentlemen by the names of Benton and Couch, (both of whom reside at or near Fort Mitchell,) the attachment which issued for the arrest of Major McIntosh, for a contempt of the court, with the sheriff's return thereon, and the bill of indictment against David Manning and others, for the murder of Hardiman Owens. By an examination of the letter of Major McIntosh, it is obvious that the soldiers who were present at the killing of Owens were at Fort Mitchell when that letter was written, and that the persons for whom subpœnas issued, were executed (secreted?) at the time the sheriff was permitted to search within the fort for them, is established by his, Benton's, and Couch's affidavits. From all the papers herewith sent, you will perceive that the process of the courts is set at defiance, and that without some assistance we shall have to submit to the military authority which has been established at Fort Mitchell. You can readily imagine, if the officer commanding refused to give up the soldiers as witnesses, that we cannot expect them to be surrendered to the mandatory process of the court, when that process is intended to bring them before the civil tribunals to answer to the violated laws. He has already determined "that the soldier who shot Hardiman Owens was in the lawful execution of his duty," and from this decision there can be no appeal unless the arm of the State is put forth to protect the courts. It need not be stated to your Excellency that the common soldier is but the mere machine in the hands of the officer, and you can, without difficulty, see that there is too much reason to believe that the apprehensions of the sheriff are too well founded. You will also perceive that the *posse comitatus* is entirely insufficient to afford adequate protection to the court and its officers. It only remains, then, for your Excellency to apply the proper remedy, and place at the disposal of the sheriff a sufficient force to command respect to the laws. Until this be done, or the United States troops removed, it will be in vain to attempt to enforce the criminal laws in any case where they may be interested. In closing this communication, I will only add, that the court has received every aid in his power from Colonel Pickett, who has been diligent in ferreting out the testimony, and active in his exertions to bring to justice those who have been charged with the murder of Owens.

I am, with great respect, &c.

P. T. HARRIS.

To the GOVERNOR of Alabama.

THE STATE OF ALABAMA, }
Russel County. } Circuit Court, October Term, 1833.

Personally appeared Edward Crowell, sheriff of said county, in open court, who, being duly sworn, deposeth and saith, that on the 14th inst. he had placed in his hands, by order of said court, subpœnas for Frank

Borger, James Emmerson, James King, and David Manning, officer and soldiers of the United States army, under command of Major James S. McIntosh, at Fort Mitchell, in said county; that he proceeded to the quarters of the major, and told him he had certain processes for the individuals above named, and wished to serve them. His reply was, "I'll be damned if I give up a man." After he had put up his horse and returned, the major, upon ascertaining the papers were not to take the persons, but merely subpoenas, affiant was permitted to search the fort, but could not find any one of them. That he succeeded in serving the subpoena on Lieutenant David Manning out of the fort. He replied, "I shall not go." That on the 15th instant a *capias*, in the nature of an attachment for contempt of said court against the said Major McIntosh, was placed in his hands by the clerk of said court. That he again proceeded to the fort, and the place where the major was, and told him he had a *capias* to take him to court. He replied, "you shall not touch me," at the same time saying he had not treated the court with contempt, and that said court had no authority to take him. That the reason he did not attempt to take his person, when he had the *capias*, was, because it would have endangered his life by so doing.

That he is satisfied any attempt he may make to serve process on said soldiers, or upon the said major, will be resisted, and prove useless. That the power of the county is insufficient to execute process on said persons, situated as they are with arms, and protected by the fort.

Sworn to in open court.

ED. CROWELL, *Sheriff R. C.*

October 17, 1833.

I hereby certify the foregoing to be a true copy from the original on file in my office.

B. G. G. A. LUCAS, *Clerk.*

October 17, 1833.

DEPARTMENT OF WAR,

October 29, 1833.

SIR: Your letter of the 21st instant to Major General Macomb has been laid before me, and, in answer, I have to inform you that you will interpose no obstacle to the service of legal process upon any officer or soldier under your command, whether issuing from the courts of the State of Alabama, or of the United States. On the contrary, you will give all necessary facilities to the execution of such process. It is not the intention of the President that any part of the military force of the United States should be brought into collision with the civil authority. In all questions of jurisdiction it is the duty of the former to submit to the latter, and no considerations must interfere with that duty. If, therefore, an officer of the State or of the United States come with legal process against yourself or an officer or soldier of your garrison, you will freely admit him within your post, and allow him to execute his writ undisturbed.

It is manifest, however, from the course of things in Alabama, and from what you suppose to be the intention of the civil authority there, that the performance of the duty assigned to you, of removing, under the

direction of the marshal, the intruders from the public lands, may subject you and your command to serious inconvenience, and perhaps to some danger, without the interference of Government. To prevent these, and at the same time to allow the civil authority that supremacy to which it is entitled, the district attorney of the southern district of Alabama has been instructed to repair without delay, if necessary, to the ceded country, and take all proper measures to bring before the district judge of Alabama all persons prosecuted for any act done under the instructions of the Government in the removal of the intruders, and to apply for their discharge. I enclose a copy of the 7th section of the act of Congress, passed March 2, 1833, entitled "An act further to provide for the collection of duties on imports," which makes ample provision for taking from the State tribunals, and carrying before those of the United States, all persons prosecuted for these proceedings. The Government is certainly under just obligations to take all proper measures for defending those who, in the execution of their orders, have done only their duty, and this obligation will be faithfully discharged. It is in contemplation to employ a legal gentleman of high standing to aid the district attorney in this business, and it is expected that he will repair, without delay, to the places where it will be necessary for him to discharge his functions.

You will please to keep the department advised of your proceedings in this matter, and you will recollect that your whole steps will be taken under the direction of the marshal. Act in no case without his authority.

You will communicate freely with the district attorney and the assistant counsel, and let them know immediately when any prosecution is instituted against any person under your command for any proper act done in the removal of the intruders, in order that his defence may be conducted by them.

Instructions have been given for the institution of prosecutions against all persons who may be found on the ceded land after the day fixed for their removal.

Very respectfully, &c.

LEW. CASS.

Major J. S. McIntosh, U. S. Army.

DEPARTMENT OF WAR,

October 29, 1833.

SIR: I have received your letter of the 20th instant, and regret to learn that prosecutions have been instituted against you for any act done in the execution of the instructions for the removal of the intruders from the public lands in Alabama.

I have stated your request to the President, to be ordered to another post, but he does not consider such a measure proper. It is far better that you should remain at your station, than that you should leave there with an indictment pending over you. The district attorney of the southern district of Alabama has been directed to conduct your defence, and sue out a writ of *habeas corpus*, in order to carry the matter before the district judge, and then move for your discharge. He has also been instructed to give you his advice and assistance in the whole proceeding.

I have this day written to Major McIntosh, to whom I refer you for further information. You will pay particular attention to what I have said to him on the subject of submitting to judicial process. The President deems it the duty of the Government to take all legal measures for the defence and acquittal of any person who may be prosecuted for carrying these instructions into effect.

Very respectfully, &c.

LEW. CASS.

To Brevet 2d Lieut. D. A. MANNING,
U. S. Army.

DEPARTMENT OF WAR,

October 29, 1833.

SIR : It has been reported to this department that indictments have been found in one of the courts of the State of Alabama against the officer and some of the soldiers who were present at the time Mr. Owens was killed ; and it has been further represented that prosecutions will probably be instituted against all the officers and persons, civil and military, who may be concerned in carrying into effect the instructions of the Government for the removal of intruders from the public lands in Alabama.

The President, under these circumstances, feels it an act of justice to the persons who may be thus exposed to these prosecutions, to have every proper measure taken for their defence, at the expense of the United States. The 7th section of the act of Congress passed March 2, 1833, entitled " An act further to provide for the collection of duties on imports," makes provision for the issuing of writs of habeas corpus by the judges of the courts of the United States, to bring before them any person committed or confined for any act done in pursuance of a law of the United States. As the prosecutions already instituted are of a serious character, I am instructed by the President to request you to repair to the scene of these proceedings, unless the duties expected of you can be as well performed without such personal examination, and enter upon the defence of the persons who are or may be prosecuted for any acts properly done in this matter. You will please to ascertain all the necessary facts and direct the proper steps to be taken, as well in the State courts as in those of the United States, in such manner as will best ensure the acquittal and release of the parties accused. You will, in every case, apply for a writ of habeas corpus to the district judge of Alabama, and submit to him the question of the discharge of the prisoner, and such other proceedings as may appear to him to be in conformity with the law. The President has it in contemplation to despatch a gentleman of eminent legal attainments to aid you in this business, and he will probably leave here in a few days.

The situation in which these persons may be placed is certainly a hard one, exposed, as they are, to prosecutions involving the most serious consequences, for acts done in the performance of their duty. Unless, indeed, in the unfortunate death of Mr. Owens, there may have been misconduct which, however, is not known to this department, the President firmly relies upon your zeal and talents to take every legal measure to put an end to these prosecutions. And you are also requested, during the whole

course of the business, to give your advice freely to the persons who, in the performance of this duty, or in conducting their defence, may require it.

That you may see the views of the Executive with relation to the duty of the military in submitting to the civil authority, I enclose a copy of a letter this day addressed to Major McIntosh.

Very respectfully, &c.

LEW. CASS.

To the DISTRICT ATTORNEY U. S.

for the southern district of Alabama.

DEPARTMENT OF WAR,

October 29, 1833.

SIR : I have received your letter of the 16th instant, and have to inform you that measures have been taken to carry before the judicial authority of the United States, in Alabama, all persons prosecuted in the State courts for any legal act done in removing the intruders from the public lands in that State. Should such prosecution be instituted against you, you will advise the district attorney of Alabama of that fact, who will immediately apply to the district judge for a writ of habeas corpus, agreeably to the act of Congress of March 2, 1833, entitled "An act further to provide for the collection of duties on imports." The Government will not fail to take all proper steps in their power to defend, in a legal manner, all persons prosecuted for any acts justly done in carrying into effect their orders upon this subject.

I enclose a copy of a letter this day written to Major McIntosh, by which you will see that the process of the courts of the United States, or of Alabama, is in no event to be resisted.

As the time limited by the marshal for the removal of the intruders will not arrive till the 15th of January next, I do not see that any other instructions will be necessary before that time. As your further action will not be necessary till then, should intervening circumstances require additional or explanatory instructions, they will be given. In the mean time, there is not the slightest reason to believe that the views of the President or the instructions of the marshal will undergo any change, except so far as the execution of the treaty, by the location of the reservations, may render unnecessary the removal of persons from other portions of the ceded land.

The gentleman employed to assist the district attorney will soon be with you. You will consult them both, and be guided in all your proceedings by their advice.

Very respectfully, &c.

LEW. CASS.

JEREMIAH AUSTIN, Esq.

Deputy Marshal, &c.

DEPARTMENT OF WAR,

October 31, 1833.

SIR : It is the wish of the President that you should repair to the district of country in Alabama, ceded to the United States by the Creek Indians in

1832, and examine into the state of things arising out of the instructions of the Government for the removal of intruders therefrom.

The documents connected with this subject have been examined by you, and its whole bearing is well understood. I need not, therefore, recapitulate in this letter the origin and progress of the difficulties in that State, which occasion to the President much solicitude. I will state briefly, and in general terms, the objects to which you will please to direct your attention.

Immediately on your arrival at your destination, you will communicate with the military officers, with the marshal and his deputy, and with the district attorney of the United States for the southern district of Alabama. You will advise freely with the latter, and the President expects that you will both co-operate together in all proper efforts to enforce the laws of the United States, and the instructions of the Government for carrying these into effect.

The department has been advised that prosecutions have been instituted against the officer and soldiers who were present at the time Mr. Owens was killed in the attempt to remove him from the public lands. And information has also been received that prosecutions will be instituted in the State courts of Alabama against all persons employed in the business of removal. It is the duty of the Government to take all proper measures for the defence of the persons who may be thus arraigned for acts done in compliance with their duty. The 7th section of the act of Congress of March 2, 1833, entitled "An act further to provide for the collection of duties on imports," makes provision for the issuing of writs of habeas corpus by a judge of the supreme court, and by the district judge of the district, and for bringing before them all persons who may be committed or confined for any act done or omitted to be done, in pursuance of a law of the United States. Whenever any legal process is served upon a person employed in carrying into effect the instructions of the Government, on this subject, you will apply to a judge of the supreme court, or to the district judge of Alabama, for a writ of habeas corpus, and have such person brought before the judge, and then move for his discharge, or take such other steps as the facts and the law may justify. You will likewise give your advice freely to all the persons thus engaged, conduct their legal defence, whenever necessary, and appear in their behalf, before the State courts, should they be required to appear there. And generally, whenever these persons have acted in conformity with their instructions, you will take all such measures as the law provides, for saving them harmless.

You will have seen, by the letter addressed to Major McIntosh, it is the determination of the Government to preserve the proper ascendancy of the civil authority. The military force is employed by virtue of an act of Congress, in a specific object. In the execution of this, they will follow the directions of the marshal, and both will be governed by your advice, in every thing relating to the execution of their duty. Let all legal process, whether from the courts of the United States, or from the State of Alabama, be submitted to without resistance, and without hesitation. The supremacy of the civil over the military authority is one of the great features of our institutions, and one of the bulwarks of the constitution. The President is particularly solicitous that no act should be done, to violate this great principle. But, on the other hand, the marshal and the military force must be defended against vexatious proceedings; and you will, therefore, without

delay, in every instance where these are instituted, have the matter brought before a judge of the United States for his determination.

The district attorney has already been directed to institute prosecutions, under the act of Congress of March 3, 1807, against all persons who may be found upon these lands after the period fixed by the marshal for their removal; and I repeat the injunction here, that you may aid the district attorney in these prosecutions should it be necessary. The marshal and his deputy have also been directed to furnish the names of the parties and the witnesses. In addition to this, if the execution of the acts of Congress, or the instructions of the Government in conformity therewith, are forcibly opposed, all measures which the law points out, will be immediately taken for the arrest and prosecution of the offenders, as the President is determined that, so far as depends upon the Executive, the supremacy of the laws shall be asserted.

Col. Abert, of the topographical corps, and Mr. Bright, of Tennessee, have been appointed commissioners for the purpose of locating the reservations granted the Indians by the Creek treaty. It is presumed they are already in that country engaged in the execution of this duty. They have been instructed to proceed with as much expedition as possible, and, if they cannot immediately designate the individual reservations, to fix upon the several tracts within which these reservations shall be located, and afterwards to proceed to assign these to the various claimants; by these means, all the ceded country not required for the reservations will be released from those provisions of the Creek treaty which require the removal of the intruders, and the marshal will cease to enforce his instructions therein. The course which the President may determine to pursue, to prevent intrusions upon these reservations after they are assigned to individuals, will be hereafter determined and made known in sufficient season, before the 15th of January, for the government of the marshal. You will please to confer with Col. Abert and Mr. Bright.

You are authorized to incur any reasonable expense which may be necessary in carrying into effect these instructions. Your own compensation will be determined after the performance of your duties.

You are fully authorized, should you find it expedient, to communicate with the Governor and other authorities of the State of Alabama, and to explain your instructions, and the solicitude of the President that these difficulties may be removed, and the faith of the United States preserved.

Very respectfully, &c.

LEW. CASS.

FRANCIS S. KEY, Esq.

Georgetown, D. C.

DEPARTMENT OF WAR,

November 5, 1833.

SIR: I have had the honor to receive your letter of the 25th ultimo, with its enclosures, and have submitted the same to the President.

On the 10th of August last, as soon as the report of the death of Mr. Owens reached this department, a letter, a copy of which is enclosed, was written to the deputy marshal, informing him that instructions had been given to the military commanding officer to facilitate, by all the means in his power, any investigation which the civil authority may consider necessary to make into the transaction.

Directions were accordingly given to have the proper orders issued in conformity with this declaration, and I had supposed until to-day that this course had been taken; but it appears, by the letter of Major McIntosh, that there has been some mistake in the transmission of the orders.

As soon as the President was informed there was any reason to fear that difficulties would arise in the service of judicial process, issuing from the courts of Alabama, against any individual of the detachment under Major McIntosh, he directed that orders should be given to that officer to submit at once to all legal process, and to afford every facility to its legal execution.

These orders were issued some days since, and I have the honor to enclose you a copy of them.

I transmit also an extract from the instructions to Mr. Key, who has been employed to aid the district attorney of the southern district of Alabama in the legal investigations growing out of this subject, by which you will see that the supremacy of the civil authority will be asserted and maintained, so far as depends upon the Executive.

These orders and instructions will be fully sufficient to ensure the due submission of the troops now in Alabama to all legal process, and I trust will be satisfactory to your Excellency.

Having discharged this duty, you will permit me to remark that I cannot but hope that the peculiar situation of that portion of the army employed in removing the intruders from the public lands in the State of Alabama will be duly considered, and that useless prosecutions will not be instituted against them.

They are acting under the immediate orders of the Government, and, while they keep within the sphere of their duty, it is to be hoped that public opinion will discountenance any attempt to harass them. So far as the circumstances can be collected from the papers transmitted, it would appear that no opposition had been made by the commanding officer to the service of the subpoenas issued to require the attendance of the soldiers. The civil officer was admitted within the fort, and permitted to search for the persons named.

Process for contempt was subsequently issued against the commanding officer, though for what cause does not appear.

The Executive has not the means, and if it had, has not the authority, to inquire into the exercise of their jurisdiction by the courts of the State of Alabama.

But the circumstances attending the possession of the ceded country cannot escape the observation of your Excellency any more than of the President, and they certainly inculcate a lesson of forbearance, which I hope will not be overlooked. Instructions have been given for the removal to the district court of Alabama of all prosecutions instituted against the persons acting in this matter under the authority of the United States, so far as the law contains provision for such removal.

And prosecutions have been, or are to be, commenced against all persons found upon the ceded land after the day fixed by the marshal for their removal.

Very respectfully, &c.

LEW. CASS.

His Excellency JOHN GAYLE,

Governor of Alabama, Tuscaloosa.

FORT MITCHELL, *November 11, 1833.*

SIR : I arrived here this morning, having been delayed last night by the breaking down of the stages.

I find that nothing has been done by the civil authorities of the State for the purpose of arresting the persons indicted for the murder of Owens, or of enforcing the process of attachment issued against Major McIntosh. I presume from what I hear, and from what I see stated in a late Alabama paper, that they mean to wait until they hear the result of the application to the President.

I found your letter here, but Major McIntosh has not yet received his. I showed him the copy you gave me. I have had the papers, shown me by Major McIntosh, in explanation of the occurrence between him and the civil authorities, copied, and enclose them herewith. No process has ever been issued, or, if issued, attempted to be served on the soldiers charged with the murder. The sheriff came with subpoenas for several of the soldiers, (I presume to go before the grand jury,) and was allowed by Major McIntosh to go into the garrison to serve them. He went in, but could not find the men. The solicitor's letter the major was certainly not bound to comply with. The attachment, a copy of which I enclose, he refused to obey. I do not consider him very wrong there, as I think the process should state (according to the bill of rights and constitution of Alabama) in what the contempt of court consisted. There is, besides, a gross mistake in the name; and certainly his refusal to deliver up a detachment of men, or to name the persons guilty, and the witnesses to prove the offence, were most unfounded pretences for charging him with a contempt of court. He is confident that, if these men had been delivered up, they would have been convicted and executed, or perhaps sacrificed to the fury of the intruders without a trial. The excitement among this body of men has been great, and still continues. There is, however, no truth in the rumors we have heard of their being assembled in arms, or of the sheriff having collected or called for a posse, and I am satisfied that nothing will be done until we have time to make our arrangements.

I have sent for and obtained a copy of the laws of Alabama, and find that a justice of the peace, as also a coroner and sheriff, may take bail in such cases. It may be desirable to adopt this course, and give bail for their appearance at the next term, and then take measures for the removal of the cases. I shall send off early in the morning to the clerk of Russel county for copies of the indictments, and of all the proceedings of the court, both against Major McIntosh and the men.

F. S. KEY.

Honorable LEWIS CASS, *Secretary of War.*

P. S. Lieutenant Manning and three of the soldiers are indicted.

DISTRICT ATTORNEY'S OFFICE,

Mobile, Alabama, November 13, 1833.

SIR : I had the honor to receive some days ago your letter of the 17th ultimo, stating that the marshal of the southern district of Alabama had

informed the War Department that suits would probably be instituted against him for removing intruders from the ceded lands, agreeably to the instructions of the Government; that the President has directed, that when suits might be brought in the State courts, that I should cause them to be removed into the district court of Alabama, and there defended; and should there be suits which could not thus be removed, then I was further requested to conduct the defence of the marshal before the State courts, and, when I could not attend, authorizing me to employ some competent person to perform that duty. And yesterday's mail brought me your letter of the 29th ultimo, containing further instructions in reference to the same subject. Your letter of the 17th of last month requires from me no further answer than to state that I will strictly conform to the spirit of your instructions, attending in person to the defence of those who may be proceeded against *civilliter*, for acts done in the performance of duty, and of their instructions, whenever I can do so without great professional sacrifice, and, when prevented, will, under your instructions, depute some competent person to perform the duty. As yet I have heard of no suit against the marshal of the character anticipated. Your letter of the 29th ultimo enlarges the instructions contained in the letter which preceded it, and acquaints me that the President, under the circumstances alluded to, felt it an act of justice to the persons exposed to the prosecutions referred to, to have every measure taken, for their defence, at the expense of the United States, and that, as the prosecutions already instituted were of a serious character, I was further directed to repair to the scene of these proceedings, *unless* the duties expected of me could as well be performed without such personal examination, and to enter upon the defence of the persons who are, or may be, prosecuted for any act properly done in this matter, &c.; in addition to which, you have been pleased to favor me with your opinion of the construction, purview, and meaning of the 7th section of the act of Congress passed March 2, 1833, entitled "An act further to provide for the collection of duties on imports," a copy of which is furnished with your letter, with instructions to apply, under it, to the district judge of Alabama, for writs of habeas corpus, &c., and stating that the President has it in contemplation to despatch a gentleman of eminent legal attainments to aid me in this business, &c.

In answer thereto, I have the honor to state that with every disposition to carry into effect, to the utmost of my humble ability, the just and honorable views of the President in regard to those who have been unfortunately subjected to the prosecutions alluded to, I have to express my deep regret that your instructions have reached me at a period at which it is placed out of my power to repair to the scene of the proceedings adverted to, without great professional injury. On the 25th instant our circuit court will commence its session, followed by the federal court on the 2d Monday of December, and our supreme court on the 1st Monday of January next. Largely engaged as I am in these courts, it is not, I presume, expected that I should leave here, to the great injury, if not ruin of clients, but a few days before the session, for a remote county, there probably to remain until after their close. As, however, the circuit court of Russell county in the ceded territory, in which the indictments alluded to were found, closed its *semiannual* session a few days ago, and will not again sit for six months, I am of opinion that the duties expected of me, at least for the present, can be nearly as well performed without my repairing to

the ceded country, as if I were to go there. If, however, any thing should occur hereafter which shall render it necessary for me, under my instructions, to repair to the territory in question, I will most cheerfully do so, after the adjournment of the courts, and sooner if practicable. Suffer me to add, in conclusion, that I will take great pleasure in co-operating with any gentleman of legal attainments that the Government may be pleased to despatch upon this business, and that I will contribute my best and most zealous exertions to accomplish the just views of the President in regard thereto, as expressed in your letters.

I have the honor to be,

Very respectfully,

Your most obedient servant,

JOHN ELLIOTT.

Honorable LEWIS CASS, *Secretary of War.*

FORT MITCHELL, November 14, 1833.

SIR: Since my last I have made another effort to obtain from the clerk of Russel county copies of the indictments, and other proceedings of the circuit court for that county, against the officers and men of this garrison.

The clerk was not at home, but I was informed, by a young man, that orders had been given by the solicitor that the records and proceedings of the court should not be seen, nor any copies of them given. He told me, however, that a Tuscaloosa paper contained copies of the judge's letter to the Governor, and of all the papers, except the indictments. This paper I have obtained, and find that the Governor has sent, with his late communication to you, copies of them. I presume, when he receives your answer, he will take his measures, and, if he determines that these prosecutions shall be enforced, he will order out the militia.

In such a state of things, he will, perhaps, before he issues such an order, appoint a new sheriff here, and have process issued on the indictments against Lieutenant Manning and the men, and, possibly, have the attachment renewed against Major McIntosh. By the laws of Alabama, bail is allowed in all criminal cases, "except in capital cases, where the proof is evident, or the presumption great." I am well informed that, both here and at Montgomery, the general sentiment is declared that they cannot be bailed. Here, in this county, there is but one justice of the peace. He is an intruder, who has a fine plantation between here and Columbus. He was here yesterday, and declared publicly, at the tavern, that the killing of Owens was a base and inhuman murder.

If bail should be refused, they must go to jail, and the jail to which they would be sent is in Montgomery.

If the civil process of Alabama can be thus used, it is obvious that the military force here cannot be employed by the Government of the United States, for the purpose for which they intend it, and the Government may as well withdraw the troops, and abandon its purpose. If the commander of the post, and his officers and men, can be thus disposed of, what is to prevent this justice of the peace from issuing warrants, and committing all the officers and men of the post, for trespasses and assaults upon the intruders, or any other offences with which they may be charged? The intruders also may harass them with civil process, and require surety of

the peace, &c.; and the justice may allow or refuse bail, as he pleases. I am sensible, however, that we must submit to some wrong, indeed, to every thing that has any appearance of legality. But, if the process of Alabama is grossly abused, and applied to defeat a lawful object and a plain duty of the General Government, and to take from them the only power by which they can act efficiently, in accomplishing such object and fulfilling such duty, why shall not the officers of Government assert the right of the Government on its own soil?—the right of removing intruders, who use these or any means of obstructing the Government in its lawful purpose. If the sheriff of Russel county has a right, because Alabama has jurisdiction here, to execute the process of her courts, the marshal of the United States has a right, if the sheriff is an intruder upon her lands, to remove him. If these two rights are in conflict, as they evidently will be, is the Government of the United States to yield?

I have made these suggestions for your consideration, in order that you may determine whether, if such a state of things occurs as a palpable abuse, on the part of the State authorities, of her legal process, for the purpose of defeating the Government measures, your officers may not be instructed to meet this process, even though legal as to its forms, with the assertion of the Government's right to remove the persons, coming with such process, as intruders, from the public lands. These people are all residing here by the indulgence of the Government. Shall it not withdraw that indulgence, when it is thus abused? In the present state of things, however, we are to consider all legal process as not to be opposed or evaded, by the assertion of this right to remove intruders, or in any other way.

I have, therefore, advised the officer, Lieutenant Manning, and the men who are indicted, to submit to the process that may issue on the indictments, and to offer bail, and, if the bail is refused, to submit to the commitment.

If the attachment against Major McIntosh should be renewed by the clerk, or by the order of the solicitor or of the judge, out of court, I consider it not legal process, and have so advised him.

I have thought it best to request the district attorney and the marshal to meet me at Tuscaloosa, for which place I am to set out in the stage to-night. I have not much apprehension that any process will be served, until I can arrange with the district attorney as to our course of proceeding, and return. But I have told the gentlemen here, if such a thing should occur, and they should feel any difficulty as to how they should act, to endeavor to prevail on the officer to hold up the process till I return, they giving him security that they will then appear before him. The present coroner, if such process comes to him, they have no doubt, will grant this indulgence.

I hope the Legislature of the State will see the necessity of preventing the conflicts that must occur from the present state of things; at all events, I shall be able there to learn whether there is any prospect of the State's persisting in opposing the Government in the course which it is now taking to fulfil the stipulations of the treaty. I shall require the marshal to send a deputy to this vicinity forthwith. There is now no means of redressing whatever outrages may be committed upon the Indians, nor of letting it be seen that the measures of the Government, now in operation here, must not be frustrated.

Colonel Abert is preparing to commence his surveys, and hopes to be ready in time. I will write again from Tuscaloosa.

I am, sir, with great respect,

Your obedient servant,

F. S. KEY.

To the Hon. SECRETARY OF WAR.

P. S. The three men, named in the newspaper as indicted, are still in the garrison; all the others, composing the detachment, except one, and among them the man who shot Owens, have deserted.

Extract of a letter from Mr. Key to the Secretary of War, dated November 15, 1833.

"I shall endeavor to make some arrangement with the district attorney for the safety of the persons now under prosecution, and to guard, as far as practicable, against further efforts of the same kind, against the persons in the public employment. The distance of the United States judge from the place of these prosecutions, and the contempt with which, I am sure, his authority would be treated by the officers of the State here, will, I fear, render this very difficult to accomplish."

Extract of a letter from F. S. Key, Esq. to the Secretary of War, dated November 30, 1833.

"I then applied to him to know the situation of the prosecutions against the officer and soldiers, and deputy marshal, as to which, from the refusal of the clerk to give me copies, or to let me see his records, I was entirely uninformed; and stated that I hoped it would not be considered necessary to press these prosecutions. He concurred readily as to this, and said he would see the solicitor of the district, and learn whether process had issued, and would endeavor to prevent the cases from being further proceeded in. He then told me that he had recently appointed a sheriff for that county, and I regretted to learn that the man he had appointed was one who had distinguished himself for his violence, in reference to the killing of Owens, and in instigating the prosecutions. Upon my telling him this, he expressed his regret that he had appointed him, and said he was the only candidate, and had been recommended by the people of the county. Before any arrangement was made with the solicitor, he showed me a letter he had prepared to send to the sheriff, directing him, if the process was served, not to commit the parties to jail, but to put them under charge of Major McIntosh, and, if the process was not served, to hold it up. Just then I received a letter from Major McIntosh, informing me that the sheriff had been to the fort, had served the capias on Lieutenant Manning, and taken his bond, by way of bail, for five hundred dollars, for his appearance at the next term of Russel circuit court, (which, by the laws of Alabama, he had no right to do, so that the bond is void,) and had asked leave to go into the garrison and arrest the soldiers, and went in, and returned, saying he could not find them.

"I told the Governor this, and he seems well satisfied ; and I apprehend nothing more will be done about the prosecutions. He has manifested, throughout, a disposition to remove all grounds of difference now existing, and to prevent the recurrence of any others. He means, in a day or two, to make a further communication to the Legislature on the subject, stating your reply to the last communication, and showing that he considers the controversy settled.

"I have had letters from Mobile, from the marshal, who is sick, and from the district attorney. The process against Mr. Austill, the deputy, is in the sheriff's hands at that place, but not yet served."

Extract of a letter from Mr. Key to the Secretary of War, dated

TUSCALOOSA, December 18, 1833.

"The prosecutions, I am satisfied, will not be pressed : no further effort has been made to serve the process on the soldiers ; and Mr. Austill is near the judge, so that a habeas corpus can be obtained for his discharge, if the sheriff should think proper to arrest him, which, however, I do not think he will do."